LIBRARY
UPREME COURT, U. S.

FILED
SEP 12 1969
DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 587

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE G. GALLANTZ
300 Park Avenue
New York, N. Y. 10022

LEE C. SHAW
111 West Jackson Boulevard
Chicago, Illinois 60604

Counsel for Petitioner

of Counsel

MARVIN DICKER
L. ROBERT BATTERMAN
PROSKAUER ROSE GOETZ & MENDELSOHN
New York, N. Y.

SEYFARTH SHAW FAIRWEATHER
& GERALDSON
Chicago, Illinois

DONALD P. McHUGH
Bloomington, Illinois

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement	2
Procedural History of the Two Cases	4
Reasons for Granting the Writ	5
Conclusion	10
Appendix—	
Opinion of Court of Appeals	1a
Statutory Provisions	7a

Table of Authorities

Cases Cited

PAGE

Local 1325, Retail Clerks Int'l Ass'n v. NLRB, —— F.2d ——, 60 CCH Labor Cases ¶10,194 (D.C. Cir. July 2, 1969) 6

NLRB v. Davis Cafeteria, Inc., 396 F.2d 18 (5th Cir. 1968) 5, 6

NLRB v. Frisch's Big Boy Ill-Mar, Inc., 356 F.2d 895 (7th Cir. 1966) 5, 6

NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438 (1965) 6

NLRB v. Purity Food Stores, Inc., 376 F.2d 497 (1st Cir.), cert. denied, 389 U.S. 959 (1967) 5, 6

NLRB v. Solis Theatre Corp., 403 F.2d 381 (2d Cir. 1968) 5

Pepsi-Cola Buffalo Bottling Co. v. NLRB, 409 F.2d 676 (2d Cir. 1969), motion for rehearing en banc denied on May 15, 1969 ..... 8, 9

Statutes Cited

29 U.S.C.

§ 160(c) 7

National Labor Relations Act:

§8(a) 7

§8(a)(1) 4

§8(a)(5) 4

§10(c) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

State Farm Mutual Automobile Insurance Company petitions for a writ of certiorari to review an order of the Court of Appeals for the Seventh Circuit entered August 1, 1969 which enforced an order of the respondent National Labor Relations Board.

Opinion Below

The opinion of the court below, not yet reported, is set out in the appendix to this petition. The decision and direction of election of the Board's Regional Director, not reported, appears at page 63a of the appendix to the Petition for Certiorari in the companion case, *State Farm Mutual Automobile Insurance Company* v. *NLRB,* now pending, No. 276, October Term, 1969, filed June 23, 1969. The decision and order of the Board are reported at 169 N.L.R.B. No. 122, and appear at page 70a of the appendix to No. 276.

Jurisdiction

The order of the Court of Appeals was entered August 1, 1969. Jurisdiction here is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether unit determinations of the National Labor Relations Board which will result in representation by different and competing labor unions of employees of a single employer, who work side by side and do the same work, are in conflict with the policy of §9(b) of the National Labor Relations Act and with applicable decisions of this Court.

2. Whether, in a case in which the appropriateness of a bargaining unit is drawn in question, the National Labor Relations Board has the power to find that a litigant has committed an unfair labor practice by refusing to bargain, without first reviewing the record independently of the Regional Director's conclusion on the issue.

Statute Involved

The relevant portions of the National Labor Relations Act, as amended (29 U.S.C. §§151, *et seq.*) appear in the appendix to this petition.

Statement

Almost all the facts relevant to disposition of this petition are set forth in the petition in the companion case, filed June 23, 1969, which bears the same title as this one and is No. 276, October Term, 1969.

Both cases draw in question the appropriateness of collective bargaining units consisting of claim representatives employed by petitioner in the New York City area. The transcript of the evidence received by the Board in No. 276 was received in evidence at the hearings in the instant case (Jt.App. 25a-26a). In this case, both the Board and the court below based their decisions on their respective dispositions of the issues in No. 276.

In each case, the Board purported to find appropriate a unit supervised by a so-called divisional superintendent. In No. 276, the unit was defined as including claim representatives "assigned to" specified local offices in New York City; in the instant case, the unit found included claim representatives "assigned to the Smithtown, Syosset and Jericho, Long Island, New York offices" (Jt. App. 8a).

In neither case did the actual unit definition contain any reference to the divisional superintendent despite the fact that the duties of that position had been used by the Board in its reasoning as a "supervisory focal point" upon which to base its determinations.

In the unit established in No. 276, Insurance Workers International Union, AFL-CIO, won the election and was certified as exclusive bargaining agent. In the instant case, the election was won by American Communications Association, affiliated with the International Brotherhood of Teamsters, which was certified on September 15, 1967 (Jt. App. 11a).

It was proved in No. 276 that the number of petitioner's divisional superintendents fluctuates with the volume of business in the division (Jt. App. in No. 276, pp. 44-45). The evidence in the instant case revealed that, in late 1967, a fifth divisional superintendent was added in petitioner's New York division. He was assigned to the supervision of

claim superintendents some of whom had formerly been in each of the two geographical areas included in the two units found by the Board to be appropriate (Jt. App. 77a).

Therefore, assuming the validity of the Board's reasoning that a divisional superintendent is a "supervisory focal point" for an appropriate unit, employees doing the same work, side by side, under one such supervisory focal point, are now to be represented by two different labor unions (*ibid.*).

Procedural History of the Two Cases

In the representation proceeding in No. 276, after hearing, the record was transferred to the Board for disposition. The Board found the questioned unit to be appropriate and issued its decision and direction of election. After the Insurance Workers were certified as bargaining agent, petitioner refused to bargain in order to test the appropriateness of the unit. A complaint issued, and the General Counsel moved for "summary judgment." That motion was granted over petitioner's objection and petitioner was found guilty of having violated §8(a)(5) and §8(a)(1) of the Act.

In the representation proceeding in the instant case, the Board itself did not pass on the crucial issue of the appropriateness of the bargaining unit. The Regional Director issued the decision and direction of election (Jt. App. 4a-10a). In it, he took cognizance of the increase in the number of petitioner's divisional superintendents and of the fact that six claim representatives (four from the New York City unit established in No. 276, and two from the very unit here under consideration) were soon to come under the supervision of a new divisional superintendent (Jt. App. 7a). These new facts, said the Regional Director,

revealed no basic change in organization and warranted no departure from the Board's finding in No. 276.

Petitioner again refused to bargain; again, a complaint issued; and, again, the General Counsel moved for "summary judgment." By then, the new divisional superintendent had already been appointed and the transfers mentioned by the Regional Director had become a fact (Jt. App. 77a). In granting the motion for summary judgment without a hearing, the Board did not even purport to pass on the new facts presented. It noted that the Regional Director had relied "on the Board's rationale in" No. 276 (Jt. App. 84a), and held that petitioner was "not entitled to litigate issues which were or could have been raised in the prior representation proceeding." (Jt. App. 86a).

Reasons for Granting the Writ

1. In No. 276, we pointed out that, although the Board is granted wide discretion in determining the appropriate bargaining unit, Courts of Appeals may accept the Board's finding of fact only "if supported by substantial evidence on the record considered as a whole" (§10(e) of the Act, 29 U.S.C. §160(e)). We called attention to the increasing number of cases in which Courts of Appeals have found that, in making unit determinations, the Board has failed to articulate substantial reasons to support its decision, or acted in a way so inconsistent with the Board's own decisions as to suggest arbitrariness, *NLRB* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F.2d 895 (7th Cir. 1966); *NLRB* v. *Purity Food Stores*, 376 F.2d 497 (1st Cir.), *cert. denied*, 389 U.S. 959 (1967); *NLRB* v. *Davis Cafeteria, Inc.*, 396 F.2d 18 (5th Cir. 1968); *NLRB* v. *Solis Theatre Corp.*, 403 F.2d 381 (2d Cir. 1968).

To this list should be added *Local 1325, Retail Clerks Int'l Ass'n* v. *NLRB*, —— F.2d, ——, 60 CCH Labor Cases ¶10,194 (D.C. Cir. July 2, 1969), in which a unit determination was upset because the reasons given by the Board for its determination did not justify its conclusion. In that case, the court, after acknowledging "that reviewing courts should give the Board broad discretion in the determination of whether a unit is appropriate," cited *Frisch's, Davis* and *Purity* to show that, in unit determinations, "the Courts of Appeals, particularly in the last four years, have not shrunk from their duty to refuse enforcement" (*Id.* at p. 16,660).

The decision in the *Local 1325* case serves to emphasize the Board's unwillingness to abide by any adverse decision in this field, and the likelihood that it will continue to add to the existing confusion by ignoring the command of this Court that it disclose, not some meaningless catch phrase, but substantial reasons as the basis for its order, *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965).

The unit determination in both No. 276 and this case resulted from a strained and unjustifiable effort by the Board to fit this petitioner into a pattern it had earlier developed for life insurance agent cases, notwithstanding the Board's own finding that the evidence in this case "presents a significantly different picture of field operating procedure from that developed in" the life insurance cases (Appendix to Petition in No. 276, pp. 45a-46a).

This effort led the Board, in giving the reasons for its determination in No. 276, to fix upon petitioner's divisional superintendents as "a supervisory focal point" and, at the same time, to define bargaining units without reference to any such focal points. That the "supervisory focal point" was only a creation of the Board's desire to fit petitioner into the life insurance pattern is evidenced by the fact that

the actual determinations in both cases defined the units in geographical terms only: "claim representatives . . . assigned to" specified local offices. In No. 276, those local offices were the ones in New York City; in the instant case, they were the ones in Long Island.

The practical effect of this determination has been to require petitioner to bargain with two different unions as the "exclusive" collective bargaining agents of a single small group of employees who do the same work in the same places. The determinations in No. 276 and in the instant case thus serve to inhibit efficient collective bargaining and to confound the confusion that already exists in this field.

2. Only the National Labor Relations Board itself may decide whether a litigant has committed an unfair labor practice. See §10(c) of the Act, 29 U.S.C. §160(c). In this case the question was whether petitioner had violated §8(a) of the Act by refusing to bargain with the representative of an appropriate unit of employees. Fundamental to determination of that question was the question whether the unit found by the Regional Director was in fact appropriate in the light of the evidence presented.

The Board never functioned on this fundamental question. It never reviewed, independently of the Regional Director's conclusion, the evidence of the facts that had developed during the sixteen months since its unit determination in No. 276. It never, in so many words, even approved the Regional Director's decision. It contented itself merely with the statement that petitioner was not entitled to litigate issues which were "or could have been raised in the prior representation proceeding" (Jt. App. 86a), without saying how petitioner litigated, or could have litigated, events that had not occurred at the time of that prior proceeding.

The statement of the court below that the Board "reviewed the substance of the entire proceeding" (appendix to this petition, p. 5a) is simply unsupported by the Board's own decision and order (Jt. App. 82a-92a).

The decision of the court below is therefore in direct conflict with the decision of the Second Circuit on the same matter in *Pepsi-Cola Buffalo Bottling Co.* v. *NLRB,* 409 F.2d 676 (2d Cir. 1969), motion for rehearing en banc denied on May 15, 1969, where, as in the instant case, the Company had refused to bargain in order to test the correctness of a Regional Director's certification of a unit as appropriate. There, too, the General Counsel, relying on the Regional Director's decision, moved for and obtained summary judgment directing the Company to bargain.

In the words of the Second Circuit, per Judge Kaufman (409 F.2d at 679): "Thus, the Board never reviewed the record independently of the Regional Director's conclusion on this issue, it simply swallowed his decision into its own." This, said the court, was error because the Board and only the Board has been invested by Congress with power to decide whether and when a litigant has committed an unfair labor practice.

> "The Board seeks to use the rule against relitigation to carve out an exception for unfair labor practices that happen to arise in the context of a representation dispute, though conceding that if this unfair labor proceeding arose independently of the representation dispute the petitioner would have been entitled to full review by the Board of the Hearing Examiner's findings of fact and conclusions of law. We see no basis for thus mutilating the legislative scheme. The consequences of committing an unfair labor practice are the same no matter what the source of the dispute." (*Id.* at 680).

And, at page 681:

> "We are mindful of the pressures upon the Board arising out of the many responsibilities assigned to it. It is not our desire, therefore, needlessly to require the Board to duplicate the work of its Regional Directors. Rather, we seek only to insure that, before taking the serious step of declaring that an employer has committed an unfair labor practice, the Board will simply review the record before the Regional Director to determine whether his decision was correct, and not merely whether it was clearly erroneous. It may be that in the greater number of cases such as this the result will be no different. However, it is in the cases which present difficult, factual and legal issues that the Board's superior knowledge and background is most desirable."

The court below therefore erred in holding that the decision in *Pepsi-Cola* "does not govern" this one. The two decisions are in direct conflict with each other and a writ of certiorari must issue in this case if that conflict is to be resolved.

CONCLUSION

For the reasons given, the writ of certiorari should be granted.

Respectfully submitted,

GEORGE G. GALLANTZ
LEE C. SHAW
Counsel for Petitioner

of Counsel

MARVIN DICKER
L. ROBERT BATTERMAN
PROSKAUER ROSE GOETZ & MENDELSOHN

SEYFARTH SHAW FAIRWEATHER
& GERALDSON

DONALD P. McHUGH

September 9, 1969

APPENDIX

Opinion of Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 16809 SEPTEMBER TERM, 1968 APRIL SESSION, 1969

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *Petitioner,* v. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	Petition for Enforcement of an Order of the National Labor Relations Board.

August 1, 1969

Before KILEY and FAIRCHILD, *Circuit Judges,* and WISE,* *District Judge.*

KILEY, *Circuit Judge.* This is a petition to review and set aside the National Labor Relations Board's order that petitioner State Farm Mutual (Company) bargain with the union[1] representing State Farm claim representatives. We deny the petition and, in accordance with the Board's cross-petition, enforce the order.

---

* Judge Wise, from the Eastern District of Illinois, is sitting by designation.

[1] American Communications Association (ACA).

The question raised by the Company's petition to review is whether the Company's claim representatives supervised by a divisional claim superintendent form an appropriate unit so as to justify the Board's order that the Company bargain with the union representing the unit. Essentially the same question was raised earlier by the Company in this court in *State Farm Mutual Auto Ins. Co. v. NLRB,* (7th Cir., slip opn. 16175, March 26, 1969), referred to here as *State Farm I.* We shall herein refer to the case before us as *State Farm II.*

In *State Farm I* the Company refused to bargain with the union[2] which had been certified as bargaining representative for the Company's claim representatives or adjusters working in New York City and in the lower part of Westchester County. In *State Farm II* now before us the ACA was certified as bargaining representative for the claim representatives in Nassau and Suffolk Counties, who had earlier rejected IWIU in the election.

In *State Farm I* this court en banc held that the Board did not abuse its discretion in choosing the Company's claim representatives as an appropriate unit for bargaining. We granted enforcement of the summary judgment order of the Board that the Company bargain with IWIU. That decision virtually disposed of the question presented in *State Farm II* by the Company's main brief and the Board's brief, *i.e.,* whether the unit chosen was appropriate. In the Company's reply brief filed April 14, 1969, however, reliance is placed on the recent Second Circuit case, *Pepsi-Cola Buffalo Bottling Co. v. NLRB,* 409 F.2d 676 (2d Cir. 1969), to set aside the Board's summary judgment before us, not on the ground that the unit is inappropriate, but on

[2] Insurance Workers International Union (IWIU).

the ground that the Board failed to make its own determination that the unit is appropriate.[3]

In essence, the Company's reply brief argues that when the hearing in *State Farm II* was held, it was able "for the first time" to prove that the unit determination in *State Farm I* "must inevitably" lead to labor strife. The reason—as stated in the Company's main brief—is that the unit chosen by the Board is "unstable and subversive of efficient collective bargaining and harmonious labor relations." The Company argues that since the Board itself has not considered these "new facts" on their merits, its order should be set aside under the *Pepsi-Cola* decision. In view of our decision in *State Farm I*, we limited oral argument in *State Farm II* to the issue whether the *Pepsi-Cola* decision should govern this case.

The "new facts" are: The Company in 1967—after the Board's decision in *State Farm I*—added a "fifth divisional claim superintendent" responsible for three "claim representatives" in New York City and two in Nassau and Suffolk Counties. The result is that three claim representatives in New York City are members of IWIU and two in Nassau and Suffolk Counties are members of ACA. And the Company now faces different bargaining agreements of rival unions representing members doing the same work under a single supervisor.

Pepsi-Cola is distinguishable from *State Farm II*. In *Pepsi-Cola* the court held that the Board failed to perform its statutory function of independently determining the "crucial issue"—whether Pepsi-Cola's distributors were employees. Instead, the Board, having denied petition to

[3] On May 5, 1969, we granted leave to the Board to file as a supplemental memorandum, a copy of its petition for rehearing in the *Pepsi-Cola* case.

review the Regional Director's determination, thereby affirmed it and incorporated that determination into its order. Here the Board has reviewed the record.

In *State Farm I* the Regional Director had determined that the Company's claim representatives constituted an appropriate unit. In the unfair labor practice proceeding the Company sought to have the Board transfer the cause to a trial examiner for further hearing on the issue of appropriateness of the unit. The Board refused on two grounds: since the evidence was merely cumulative, the issue "need not be relitigated"; and since the evidence to be offered at the "further hearing" was available at the time of the representative hearing, the Company had the duty to produce the evidence there. This court's opinion, filed March 26, 1969, found no abuse on the Board's discretion in the Board's ruling. *State Farm I,* slip opn. p. 8.

Meanwhile, ACA filed its representation petition May 8, 1967, to begin this, the *State Farm II* proceeding. A hearing was held on the same issue that was heard at the corresponding hearing in *State Farm I.* The record in *State Farm I* was introduced before the hearing officer and the additional evidence—for which the Company sought the "further hearing" in *State Farm I*—was introduced. This included the history since 1958 up to late 1967 of the Company organization in creating additional divisional claim superintendents and re-assigning existing ones. The Company urged on this evidence that the claim representatives unit chosen by the Board in *State Farm I* was subject to "constant and frequent change" with representatives in and out of the unit and no "stability of collective bargaining." The Regional Director, on the record of *State Farm I* and the additional evidence, determined the claim representatives formed an appropriate unit. The union's certifi-

cation, the Company's refusal to bargain, and the unfair labor practice proceeding in *State Farm II* followed.

In its answer to the General Counsel's complaint the Company stated the unit was "arbitrary," bore no relationship to the Company operating structure, unreasonably divided a "homogenous group of employees" and would result in "chaos and labor unrest." The General Counsel moved for summary judgment, pointing out that the Company's answer did not assert newly discovered evidence or its unavailability at the representative hearing in *State Farm II*. The Company's response to the motion set out, in substance, the additional facts testified to at the hearing, and stated that if the Board would reconsider its decision denying petition to review, the Company would show that the superintendent added in 1967 was supervising the claim representatives "in the same 'unit,' doing the same work, but . . . represented by two . . . unions."

The Board ordered the proceeding before the Regional Director transferred to itself. In its Decision and Order "upon the entire record in this case," the Board granted summary judgment on the General Counsel's motion. It reviewed the substance of the entire proceeding, including the contentions asserted by the Company in its opposition to the summary judgment motion. These were the asserted changes in the Company structure, and the chaos, etc., due to result from the arbitrary unit chosen. The Board noted it had considered the same contentions previously and found the General Counsel's allegations supported by the record or admitted. The Board then found, *inter alia,* that the claim representatives constituted an appropriate unit.

The uncontroverted "new facts" were before the Board when it ruled on the summary judgment motion. There was no genuine issue of material fact raised by the motion

and "opposition." The Board itself determined the "crucial issue."

We conclude therefore that the decision in *Pepsi-Cola Buffalo Bottling Co. v. NLRB*, 409 F.2d 676 (2d Cir. 1969), does not govern *State Farm II*.

The order will be enforced.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

Statutory Provisions

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

* * *

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

Sec. 10 (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. . . . The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person

or otherwise and give testimony at the place and time fixed in the complaint.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

(e) The Board shall have power to petition any court of appeals of the United States, * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * *. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia,

by filing in such court a written petition praying that the order of the Board be modified or set aside. * * * Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, * * * [T]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.